No. 20069

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LOZANO ENTERPRISES,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition to Set Aside Decision and
Order of the National Labor Relations Board

PETITIONER'S OPENING BRIEF

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

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PETITIONER'S OPENING BRIEF

I

JURISDICTION

The National Labor Relations Board issued its Decision and Order herein dated January 26, 1965, finding Petitioner guilty of a violation of Sections 8(a)(3) and (1) of the National Labor Relations Act. This Court has jurisdiction to review the Board's Decision and Order upon petition of Lozano Enterprises, a person aggrieved thereby, 29 U.S.C.A. § 160(f). Such petition was filed May 12, 1965.

II

CONCISE STATEMENT OF THE CASE AND QUESTIONS INVOLVED.

The facts of this case are simple:

Jose Nabor Villasenor was a night shift linotype operator for Lozano Enterprises when he was discharged. (TXD p. 2, lines 24-25.)[1] The Ninth Circuit thereafter decreed Villasenor's reinstatement. NLRB v. Lozano Enterprises, 318 F.2d 41 (9 Cir.1963).

Villasenor's reinstatement required his re-employment as a linotypist on the night shift, his position when terminated and for which a wage premium was paid. (TXD p. 4, lines 15-17.)

In order to make room for Villasenor, it was necessary to terminate another linotype operator. (TXD p. 3, lines 27-31.)

At the time of Villasenor's reinstatement, Javier Martinez was one of four night shift linotypists. (TXD p. 2, lines 43-51.)

Martinez was the most junior on the night shift and, in fact, was the most junior but one of all the linotypists in the entire plant. (TXD p. 3, lines 20-23).

Barunda, the only linotypist junior to Martinez,

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[1] "TXD" refers to the Trial Examiner's Decision, adopted by the Board. The facts herein recited are those actually found by the Board.

was the better employee of the two. (TXD p. 5, lines 52-54; p. 8, line 55 - p. 9, line 1.)

Martinez was laid off due to the reinstatement of Villasenor. (TXD p. 2, lines 19-24.)

The question involved is:

1. Since Martinez was the most junior linotypist on the night shift, and since the only linotypist in the entire plant more junior to Martinez was a better employee (as found by the Board), was it discriminatory for Petitioner to lay off Martinez in order to reinstate Villasenor to the night shift?

The answer is that it was not discriminatory, and the conclusion of the Board that it was is directly contrary to and is unsupported by the facts found by the Board.

III

SPECIFICATION OF ERRORS

It was error for the Trial Examiner and the Board to conclude that Petitioner discriminated against Martinez and thus violated Sections 8(a)(3) and (1) of the Act.

IV

PETITIONER IN NO WAY DISCRIMINATED AGAINST MARTINEZ.

As shown above, the pertinent facts of this

case are simple. The Trial Examiner and the Board both found that Villasenor's reinstatement to the night shift required another linotypist to be laid off. Martinez, the one selected, was the most junior on the night shift and the next most junior in the entire plant. The only linotypist in the whole plant most junior to Martinez was a better employee, as found by the Board.

And yet, in the face of these facts as found, the Board concluded that Martinez was discriminated against and that, if there had been no discrimination, Petitioner would have selected the only employee junior to Martinez for the lay off. (TXD p. 10, lines 16-32.)

However, the one more junior employee that the Board says should have been selected for the layoff was, as found by the Board, a better employee than Martinez. Since he was a better employee, the Board's conclusion that he would have been the one laid off, absent discrimination against Martinez, is absolutely without support from the evidence. There simply is no reason at all to suppose that Petitioner would or should have laid off an employee who, as found by the Board, was better than Martinez.

The mere fact that Martinez was a member of the union does not in and of itself shield him from being laid off:

> "That [Martinez] was a union member and an active movant in the organizational drive

will not shield him from release for good cause. Martel Mills Corp., supra, at page 633. If discrimination may be inferred from mere participation in union organization and activity followed by a discharge, that inference disappears when a reasonable explanation is presented to show that it was not a discharge for union membership. N.L.R.B. v. Stafford, 8 Cir., 1953, 206 F.2d 19, 23."

NLRB v. United Brass Works, Inc.,
287 F.2d 689, 693 (4 Cir.1961).

See also:

NLRB v. Florida Steel Corp.,
308 F.2d 931, 935 (5 Cir.1962);

NLRB v. Threads, Incorporated,
308 F.2d 1, 13 (4 Cir.1962).

As said in Metal Processors' Union Local No. 16, AFL-CIO v. NLRB, 337 F.2d 114, 117 (D.C.Cir.1964), an inference that an employee was terminated on account of his union activities may not be drawn from the mere fact, as here, that the activities preceded the discharge. Likewise, the slight union animus found in this case by the Board (TXD p. 7, line 40 - p. 8, line 35) is insufficient in itself to ground an inference that Martinez' lay off was violative of the Act. Ibid.

The Second, Fourth, Fifth, Sixth, Seventh and Eighth Circuits all subscribe to the same proposition. Fort Smith Broadcasting Company v. NLRB, 341 F.2d 874, 878-79 (8 Cir.1965); NLRB v. Ace Comb Company, 342 F.2d 841, 847 (8 Cir.1965).

So does the Ninth Circuit, ever since 1943. As said in NLRB v. Citizens-News Co., 134 F.2d 970, 974 (9 Cir.1943):

> "The fact that a discharged employee may be engaged in labor union activities at the time of his discharge, taken alone, is no evidence at all of a discharge as the result of such activities. There must be more than this to constitute substantial evidence."

The present case is not a case where the Board found, contrary to Petitioner's testimony, that the most junior employee was not in fact the better employee; this is a case where the Board itself found that the most junior employee was better. In the face of this finding, the Board's decision that the better employee should have been laid off, rather than Martinez, is for the Board to intrude directly into the management of Petitioner's business. But this the Board cannot do; management is for management, and neither Board nor Court can second-guess it or give it guidance by over-the-shoulder supervision. NLRB v.

Sebastopol Apple Growers Union, 269 F.2d 705, 713 (9 Cir.1959

V

CONCLUSION

Petitioner deviated from a strict seniority lay-off by only one man. Except for that one man, Martinez was the most junior in the entire plant. With no exceptions, he was the most junior on the shift to which Villasenor had to be reinstated. The one man in the entire plant more junior than Martinez was, as found by the Board, a better employee.

Petitioner had to lay off someone to make room for Villasenor. The selection of Martinez was made on normal, logical and fair criteria. It was completely objective. It was not discriminatory.

And yet the Board now tells Petitioner that the one single more junior employee to Martinez should have been laid off instead. And the Board says this in the face of its own finding that this one employee was better. By its decision, the Board tells Petitioner to discriminate in favor of Martinez, because of his union activities, and against the better employee. The Act does not allow this. By its decision, the Board tells Petitioner that Martinez' union activities give him special protection against a necessary lay off. The Second, Fourth, Fifth, Sixth,

Seventh, Eighth, Ninth and District of Columbia Circuits do not allow this.

The Board should be reversed.

DATED: October 28, 1965.

Respectfully submitted,

SHEPPARD, MULLIN, RICHTER & HAMPTON

By _____
Frank Simpson
Attorneys for Petitioner,
Lozano Enterprises

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those Rules.

Frank Simpson

PROOF OF SERVICE

I, the undersigned, being first duly sworn, say that I am and was at all times herein mentioned a United States citizen and a Los Angeles, California, resident, over 18 years of age and not a party to the within action; that on 28 October 1965 I served the within Petitioner's Opening Brief on the below-named parties in said action, by depositing true copies thereof, enclosed in sealed envelopes with postage thereon fully prepaid, in a mail-box regularly maintained by the United States Government at Los Angeles, California, addressed as follows:

National Labor Relations Board (3 copies)
Washington 25, D.C.

General Counsel, National Labor Relations Board, 21st Region
849 South Broadway, Los Angeles, California 90014

James R. Webster, Esquire, Trial Examiner
National Labor Relations Board
Federal Building
450 Golden Gate Avenue
San Francisco, California

Shirley Schuster

Subscribed and sworn to before me 28 October 1965.

Notary Public, California
Principal office, Los Angeles County

E. M. DOIRON
My Commission Expires February 17, 1966

OFFICIAL SEAL
E. M. DOIRON
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY